91-529

No. 91-

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

ABUNDANT LIFE CHRISTIAN CENTRE, INC.

Petitioner,

v.

WILLIAM MARKHAM, as Broward County Property Appraiser,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state statute that requires that an action to contest a real property ad valorem tax assessment be brought within sixty days from the date the assessment is certified for collection or be forever barred violates the real property owner's due process rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that both the method of giving notice and the content of the notice are inadequate to afford taxpayers an opportunity to present their objections.

2. Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution is violated by a property appraiser who, upon the request of a property owner, agrees to review for exemption a real property ad valorem tax assessment, fails to apprise the property

owner of the final date to contest the assessment, and then refuses to review the assessment for exemption after the termination of the contest period.

STATEMENT REGARDING CORPORATION

As required by Rule 29.1 of the Rules of the Supreme Court, Abundant Life Christian Centre, Inc. states that it has neither parent nor subsidiary corporations.

STATEMENT UNDER RULE 29.4(c)

Because the constitutionality of Fla. Stat. Ann. sec. 194.171(2), Fla. Stat. Ann. sec. 194.171(6), and Fla. Stat. Ann. sec. 193.122(2) are all drawn into question, and because neither the State nor an agency, officer, or an employee of the State is a party, 28 U.S.C. sec. 2403(b) may be applicable.

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OPINIONS BELOW

Abundant Life Christian Centre, Inc. ("Abundant Life") filed an action against the Broward County Property Appraiser ("Property Appraiser") with regard to ad valorem real property taxation on real property owned by Abundant Life in Broward County, Florida. The action proceeded under an Amended Complaint. (App. 1a-17a)

The Property Appraiser sought summary judgment, which was denied by the Broward County Circuit Court under an Order Denying Motion for Summary Judgment. (App. 18a-19a) Thereafter, the Property Appraiser sought a Writ of Prohibition.

The Florida Fourth District Court of Appeal reversed the Broward County Circuit Court under an opinion that consists of a Writ of Prohibition directed to the Circuit Court Judge and mandating the

entry of summary judgment on behalf of the Property Appraiser and against Abundant Life. The opinion appears in the Appendix at pages 50a-60a and has been published as Markham v. Moriarty, 575 So.2d 1307 (Fla.App. 4th DCA 1991). The opinion is based upon the position that the courts are divested of jurisdiction under a Florida Statute limiting the period in which to contest an ad valorem real property tax assessment to the sixty days after the certification by the Property Appraiser of the tax rolls.

Consequent upon the Writ of Prohibition, the Broward County Circuit Court entered an Order Granting Motion for Summary Judgment. (App. 63a-64a) Although the Supreme Court of Florida permitted Abundant Life to appeal as the real party in interest, App. 65a, it declined to

accept jurisdiction under Abundant Life's Petition for Review. (App. 66a-67a)

JURISDICTIONAL STATEMENT

Abundant Life prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Florida entered in the above-captioned case on June 28, 1991, denying review of a Writ of Prohibition entered by the Florida Fourth District Court of Appeal holding that Florida Statutes secs. 194.171(2) and 194.171(6) are not unconstitutional as a violation of Abundant Life's due process rights under the Fourteenth Amendment of the United States Constitution. This Petition is being docketed in this Court within ninety days from the date that the Supreme Court of Florida declined to accept jurisdiction on Abundant Life's

Petition for Review. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment XIV to the Constitution of the United States provides in pertinent part:

> . . . no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fla. Const. art. VII, sec. 3(a). See Appendix for text.

Fla. Stat. sec. 193.122(2). See Appendix for text.

Fla. Stat. sec. 193.122(3). See Appendix for text.

Fla. Stat. sec. 194.171(2). See

Appendix for text.

Fla. Stat. sec. 194.171(6). See Appendix for text.

Fla. Stat. sec. 196.192(1). See Appendix for text.

Fla. Stat. sec. 197.322(1). See Appendix for text.

Fla. Stat. sec. 197.322(3). See Appendix for text.

STATEMENT OF THE CASE

A. Statement of the Facts.

In late October or early November, 1989, Abundant Life received an ad valorem real property tax bill assessing a real property parcel ("Property") utilized by Abundant Life solely for purposes exempt under Florida constitutional and statutory law from ad valorem real property taxation. Fla. Const., art. VII, sec.

3(a); Fla. Stat. sec. 196.192(1). In December, 1989, Abundant Life's attorney contacted the Broward County Property Appraiser's Office to request an informal hearing to present evidence of Abundant Life's right to an exemption for the Property. Abundant Life's attorney was referred to the Property Appraiser's attorney, who informed the Abundant Life attorney that evidence of the use of the property, which is the factual basis on which an exemption request is granted, should be compiled and submitted directly to him. All the requested information was submitted in early 1990, with the request that the information be reviewed and the exemption be granted. After repeated attempts to obtain a response from the Property Appraiser's attorney in February and March, 1990, Abundant Life filed suit

to recognize the exemption under several different theories in March, 1990, which was prior to the date of delinquency for the assessed taxes. In April, 1990, Abundant Life requested that the Property Appraiser provide the dates of certification, which by statute is available to anyone who submits a written request, Fla. Stat. sec. 193.122(2), but the Property Appraiser refused to supply the date of second certification until ordered to do so by the Circuit Court.

B. Procedural History.

Abundant Life filed a Complaint against the Broward County Property Appraiser in March, 1990. Subsequently, an Amended Complaint was substituted upon Motion granted by the Circuit Court of Broward County. In addition to several counts based solely on Florida law, the

Amended Complaint alleged (1) that the Florida Statute that required persons subject to an ad valorem property tax assessment to file an action contesting the imposition of a statutorily-prohibited tax within sixty days of certification of the tax rolls, or to be forever barred, (i) without regard to the date the notices of tax due are sent to or received by the taxpayers, (ii) without regard to the length of the period between receipt by taxpayers of a notice of tax due and the date the action is barred, (iii) without notice to taxpayers of the unusually short period of time in which to file an action to contest the assessment, and (iv) without regard to the fact that the tax is not delinquent for approximately five months, is overbroad on its face, and violates the due process rights of the

property owner, and (2) that Gaylord Wood, attorney for the Property Appraiser, agreed to review for exemption the real property ad valorem tax assessment brought to his attention by Abundant Life and then, after the termination of the claims period, refused to review the assessment for the exemption. A motion for summary judgment brought by the Property Appraiser was denied (App. 18a-19a), and the Property Appraiser sought a Writ of Prohibition from the Florida Fourth District Court of Appeal, which was granted on the basis that the limiting statute was a statute of nonclaim, not limitations, and, therefore, the Circuit Court was without jurisdiction. (App. 50a-60a) The Writ of Prohibition further required the Broward County Circuit Court to grant the Property Appraiser's Motion

for Summary Judgment. After denial of a Motion for Rehearing, Abundant Life appealed the Writ of Prohibition to the Supreme Court of Florida, which declined to accept jurisdiction under Order dated June 28, 1991. (App. 66a)

RAISING THE FEDERAL QUESTION

Two questions are at issue in this Petition. Both issues were raised in the Amended Complaint.

Count IV of the Amended Complaint is entitled "Violation of Due Process Requirement." This Count recites the factual basis for Abundant Life to contest the refusal of the Property Appraiser to review a void assessment on the basis that a state statute of nonclaim prevented jurisdiction and forever barred Abundant Life owner from contesting the Property

Appraiser's assessment after sixty days from the date of certification of the ad valorem real property tax rolls. (App. 1a-17a)

The issue of the failure of the Property Appraiser to review a tax bill after being notified of Abundant Life's objection to the assessment, after agreeing to review the assessment, failing to notify Abundant Life of the date of termination of the claims period, and then refusing to review the assessment after the termination of the claims period, is first raised in Counts VI and VII of the Amended Complaint. (App. 1a-17a)

Abundant Life again raised these issues in its response to the Property Appraiser's Motion for Writ of Prohibition. (App. 20a-49a). The Florida Fourth District Court of Appeal expressly

rejected the federal constitutional claims raised before it in Abundant Life's Response to Petition for Writ of Prohibition Directed to the Circuit Court for the 17th Judicial Circuit (App. 50a-60a) and issued the Writ of Prohibition. The Supreme Court of Florida declined to review the entry of the Writ of Prohibition. (App. 66a-67a)

ARGUMENT FOR ALLOWANCE OF THE WRIT

The question presented to the Court has never previously been addressed by the Court. The issue of the adequacy of the content of published notice, in the context of ad valorem real property taxation, affects every owner, mortgagee, and lessee of real property in the United States.

The intriguing twist to the issue under consideration is that it is not only

the notice of the ad valorem real property tax assessment, but the notice of the period to contest the imposition by the state of the tax, that is inadequate. Section 194.171(6) of the Florida Statutes, the constitutionality of which has been upheld by the Florida Supreme Court in Markham v. Neptune Hollywood Beach Club, 527 So.2d 814 (Fla. 1988), removes jurisdiction from the courts and forever bars from consideration or review any objection to the Property Appraiser's tax assessment if not filed within a sixty day period. Fla. Stat. sec. 194.171(6). It is the adequacy of notice of this sixty-day period, which changes from year to year, that is at issue.

Florida law requires that a property owner file his action in court contesting an ad valorem real property tax assess-

ment, if at all, within sixty days of the date on which the county property appraiser certifies the tax roll. ("Certificate to Roll," "Certification," or "Certificate"). Fla. Stat. sec. 194.171(2). The statute limiting the contest period to sixty days, Fla. Stat. 194.171(6), has been construed as a statute of nonclaim, rather than a statute of limitations, Neptune Beach, supra, thus rendering the courts impotent in addressing issues such as estoppel, fraud, or misrepresentation on behalf of the Property Appraiser's office, such as occurred in this case. This inability of the courts even to consider whether fundamental notions of fairness have been violated by the state requires that property owners be afforded sufficient notice to protect their interests.

This Court's recent decision in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340 (1988), building on the line of cases from Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306, 70 S.Ct. 652, (1950), through Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706 (1983), requires that the adequacy of the content of publication notice in the context of ad valorem real property taxation be resolved.

This Court stated in Mullane, supra, the basic principle of due process, as follows:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id., 339 U.S., at 314, 70 S.Ct., at 657. In the language of Mullane, the question in this case is whether the notice scheme mandated by statute is reasonably calculated to afford interested parties an opportunity to present their objections.

In Pope, this Court reviewed the question of notice in the context of a probate nonclaim statute. This Court affirmed the principle in such cases that the level of notice required is to be determined by "balancing the 'interest of the State' and 'the individual interest sought to be protected by the Fourteenth Amendment.'" Id., quoting Mullane, supra, 339 U.S., at 314, 70 S.Ct., at 657.

The state's interest in the present case is to have certainty in the tax process in a timely fashion. However, the

state has no interest in failing to notify property owners of the date by which tax objections must be filed. The individual's interest in protecting his property rights from unwarranted taxation is significant.

In situations in which no particular potential creditor or claimant is known, this Court has long held that publication notice can be sufficient. See, e.g., Mullane, supra. Conversely, when a particular potential creditor or claimant is known, actual notice is required. See, e.g., Pope, supra, and Mennonite, supra.

The initial issue in this case is not whether actual notice is required, but the adequacy of the publication notice given. In North Laramie Land Co. v. Hoffman, 268 U.S. 276, 45 S.Ct. 491 (1925), this Court addressed the adequacy of the notice of

highway initiation proceedings to the affected community. The Court found publication notice to be adequate, but noted that the published notice "contained the information that all objections to the proposed road and all claims for damages 'must be' filed not later than June 7, 1917." Id., at 280-281, 45 S.Ct., at 493.

In Armstrong v. Armstrong, 130 F.R.D. 449 (D.Colo. 1990), a probate claims case decided after Pope, supra, the Court held that "the relevant inquiry is not whether [potential claimants] had actual knowledge that decedent's estate was open, but rather, whether [they] had actual notice of the deadline for filing claims." Id. at 453. That is exactly the concern in the present case.

In a recent case involving state income taxes, the Eighth Circuit Court of

Appeals reviewed the relevant case law and found notice of a proposed tax assessment to be sufficient when it advised recipients of the consequences of failing to protest the tax assessment. Ross v. Martin, 800 F.2d 808, 812 (8th Cir. 1986). Although it is not necessary that all the consequences of a taxpayer's inaction be relayed in the notice, it is necessary that the notice be sufficient to alert the taxpayer to substantial adverse consequences in the event of inaction. Emley v. Indiana Department of State Revenue, 536 N.E.2d (Ind.App. 1 Dist. 1989).

In a case involving the creation of a sewer improvement district, notice was found to be sufficient where it was published twice and mailed to every property owner and contained the operative statute. Burris v. Sewer Improvement Dis-

trict No. 147, 743 F.Supp. 655 (E.D.Ark. 1990). In the published notice at issue, no information is given linking the Certificate to the limitation statute or to any rights of the affected taxpayers.

This Court adopted in Mullane, supra, a test for determining whether notice is adequate:

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Id., 339 U.S., at 315, 70 S.Ct., at 657.

In the present case, the statute does not require that the published notice state the date by which objections and claims must be filed, as in North Laramie, supra, the length of the period during which to protest the tax, as in Ross, supra, that adverse consequences will

ensue in the event of inaction, as in Emley, supra, or even the operative statute, as in Burris, supra. In fact, the published notice of the Certificate does not state or suggest that any rights of the property owners are affected by the Certificate.

The only "notice" given regarding the final assessed ad valorem real property tax is the tax notice itself. Although the notices may not be sent to property owners until after the Certificate is issued, which begins the running of the sixty-day nonclaim period, the notices do not state the date when the nonclaim period begins or ends, the duration of the period, or the consequences of failing to file an objection so quickly.

Generally, affected persons are charged with knowledge of relevant

statutes. This is especially true when tax statutes are at issue, because they have universal application. See, e.g., Emley, supra. However, in the present case, knowing the statutory provisions is insufficient. Because the nonclaim period varies from year to year, depending on the date the Certificate is made, timely notice that the claims period has been triggered is critical to the taxpayer's right to file a timely objection to improper taxation.

In Ortiz v. Regan, 749 F.Supp. 1254 (S.D.N.Y. 1990), the court reviewed the constitutionality of the notice provided to a retired public employee prior to an adverse modification to her retirement benefits and concluded that it was constitutionally flawed in that it failed to inform the claimant of the opportunity

to present her objections. This decision was based on Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 98 S.Ct. 1554 (1978), in which this Court found that a notice was fatally flawed that failed to apprise utility customers of the objection process prior to termination of their utilities.

In the case at issue, the lack of any information in the published notice to trigger a response by reasonably affected individuals is further exacerbated by three factors. First, on no other notice is the property owner given actual notice of either the termination of the claims period or the fact that he has sixty days from the certification date to contest the assessment or be forever barred. Such information could be supplied at no cost and no effort by the property appraiser on

the tax notice. Under the balancing test enunciated in Mullane, supra, the state has no adverse interest or cost in providing the notice on the tax bills, while the benefit to the individual's property interest is significant.

The second factor is that the date of publication of the notice of the Certification generally occurs prior to the date a property owner receives his tax notice. Therefore, even if the property owner is aware that the Certificate somehow has an effect on his objection period, he may not even know whether he has an objection until after the sole publication. Even a diligent taxpayer who is aware that there is only one publication of the notice that begins his nonclaim period and who, therefore, reads every newspaper of general circulation in the entire county every day

from the date he receives his tax notice, would be too late to see the published notice and would never receive notice, which could have been printed on his tax notice without cost or effort. This is certainly not "notice reasonably calculated, under all the circumstances, to . . . afford [interested parties] an opportunity to present their objections." Id., 339 U.S., at 314, 70 S.Ct., at 657.

The third factor is that no requirement exists that the property owner receive his tax bill prior to the termination of the claims period. The Property Appraiser does not have a limited number of days to send the certified tax roll to the tax collector after publication of the Certification, Fla. Stat. sec. 197.322(1), and the tax collector is not required to send the tax notices within the sixty days

after the Certificate is issued. Therefore, if the Property Appraiser were to experience any delay in delivering the certified tax roll to the tax collector after the publication, or the tax collector experienced any delay for any reason in sending the tax notices, which he has twenty working days to send pursuant to section 197.322(3) of the Florida Statutes, the taxpayer may not receive his tax bill until after the claims period is over, thereby forever barring the taxpayer from contesting a tax bill that he never received in sufficient time to bring an action.

There are numerous reasons that the tax collector may not send the tax notices immediately. Whether due to a significant event, such as a court order due to a suit protesting the appraisal or collection

process, or due to a seemingly innocuous occurrence, such as an inadvertent bureaucratic or computer error in preparing or sending the bills, the fact remains that the taxpayer's time during which to respond would become impossibly short, if it has not expired altogether.

This third factor has rather far-reaching implications. Under the Florida Statutes, taxpayers are granted the right to request from the Property Appraiser a copy of the Certification. Fla. Stat. sec. 193.122(2). However, even if the taxpayer is aware of this right, it is unlikely that he would receive notice in time to protect his rights. Section 197.322(3) of the Florida Statutes requires the tax collector to mail a tax notice to the taxpayer within twenty working days after receipt of the

certified roll. However, because the Florida Statutes do not state any period of time by which the Property Appraiser must transmit the certified roll to the tax collector, even assuming that the roll is transmitted to the tax collector the very day of certification, once weekends, holidays, and the mails are taken into account, if the taxpayer receives his tax notice and diligently writes for a copy of the certification notice, the property appraiser would have the taxpayer's request for a copy of the certification as early as approximately thirty-five days after certification. There is no stated period within which the Property Appraiser must respond and, of course, this is the period during which the Property Appraiser's office is busy holding administrative tax hearings before the Property Appraisal

Adjustment Board. Given the necessary time for mailing, as well as weekends and holidays during November and December, if the Property Appraiser fails to respond within eight to ten days, the taxpayer would not even receive the notice of the date of Certification until after the date to contest the tax notice has elapsed. Such notice, even if received a few days prior to the termination of the objection period, does not cite the statute that discloses the sixty-day limitation, does not state the termination of the filing period, and does not state that actions not timely filed are forever barred. Therefore, even if through a fortuitous set of events the notice were received by the diligent taxpayer while a few days remained to file his action, the content of the notice would remain defective.

The foregoing reasons are more than sufficient under the relevant case law to find that due process requirements are not met in Florida's statutory scheme for protesting ad valorem real property tax assessments. However, in addition to the facial improprieties, Abundant Life's due process rights were further eroded by the actions of the Property Appraiser's attorney. His offer to Abundant Life's representative to review the tax assessment, which offer was not repudiated until after the termination of the claims period, coupled with his failure to apprise Abundant Life of the termination date of the claims period, violated Abundant Life's due process rights. As in Pope, supra, once an actual claimant or adverse party is known, due process requires that such party be advised of the

time within which to respond. In the present case, not only did the state, acting through the office of the Property Appraiser, not inform Abundant Life of the termination of the nonclaim period, beyond which Abundant Life would forever be barred from making any protest of its tax bill, the state gave Abundant Life information calculated to create the misimpression that the erroneous tax bill could be corrected.

The determination of whether notice is sufficient to inform a person of the potential deprivation of his property rights depends on whether the particular notice is reasonably calculated to inform those potentially injured by lack of notice, the interest of the state in not incurring additional cost for minimal benefit, and the importance of the right

to be protected. Notice that does not actually inform the property owner of the potential deprivation or the date by which he may be barred from contesting the deprivation, especially when coupled with the fact that it is not required for him to have yet been informed of the potential deprivation when the notice is given, is not reasonable notice and fails to afford the property owner due process as required under the Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant this Petition.

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 90-09869 18

ABUNDANT LIFE CHRISTIAN CENTRE, INC.,

Plaintiff,

vs.

WILLIAM MARKHAM, Property Appraiser For Broward County, Florida,

Defendant
_____/

AMENDED COMPLAINT

COMES NOW the Plaintiff, by and through its undersigned attorney, and sues Defendant, William Markham, the Property Appraiser for the County of Broward, State of Florida, and says as follows:

1. Plaintiff is at all material times an incorporated Church (the "Church").

2. Defendant is at all material

times the Property Appraiser for Broward County (the "Appraiser") and is the party against whom suit is brought pursuant to Section 194.181(3) of the Florida Statutes.

3. This is an action to contest the attempted imposition by the Appraiser of ad valorem real property taxes on property owned by the Church, the sole function of which is its use for worship and related religious activities.

4. Plaintiff has had an established place of worship at 1500 North State Road Seven, Margate, Florida, for more than 10 years.

5. On or about August 26, 1988, the Church acquired the property referred to as Parcel B of the Plat known as the CENTRAL PARK OF COMMERCE in the City of Margate, County of Broward, (the "Property") for the purpose of complying

with the zoning requirements for the establishing of a new place of worship to accommodate the Church's congregation, ministries, and service. The Property is contiguous to other property previously purchased by the Church and exempted from ad valorem taxation and was and is to be used together with the other property for the Church's exempt purposes.

6. The contiguous property and, when acquired, the Property was used a number of times from early 1987 through 1989, and at all times such use consisted solely of Church worship and related religious activities, such as prayer meetings, special services, rallies, and special youth and children's religious activities. From the time that the Property was acquired by the Church, it was never used for any purpose not exempt under the provisions of Chapter 196 of the Florida

Statues.

7. This action was brought within sixty days of the certification of the tax rolls by the Property Appraiser. All conditions precedent to the institution of this action have been fulfilled.

8. The Appraiser has made or caused to be made an assessment on the Property of ad valorem taxes for the tax year 1989 at the full commercial value and without the exemption to which the Church is entitled. A copy of the Appraiser's written Notice of Assessment is attached hereto and marked Exhibit A and shows a gross tax due of $63,527.37.

COUNT I

VOID ASSESSMENT

9. Plaintiff realleges and incorporates the statements of Paragraphs 1 through 8 as fully as if set forth herein.

10. Pursuant to Article VII, Section

3(a), of the Florida Constitution, property used for certain purposes may be exempted by general law from taxation. Section 196.192(1) of the Florida Statutes provides such an exemption pursuant to which the Property is not subject to ad valorem taxes. The assessment by the Appraiser is not authorized by law.

11. Because the property is owned by the Church and is used solely for exempt purposes, the Property is not subject to tax and the assessment against the Property is void.

WHEREFORE, Plaintiff prays for judgment against the Defendant and entry of an order declaring the assessment against the Plaintiff due to the Property to be void and extinguishing all liability of the Plaintiff thereunder; costs of this action; and such further and other relief as the Court may deem just.

COUNT II

BREACH OF STATUTORY REQUIREMENTS

12. Plaintiff realleges and incorporates the statements of Paragraphs 1 through 8 as if fully set out herein.

13. Criteria for determining whether any property is used for exempt purposes is set out in Section 196.196 of the Florida Statutes.

14. The Appraiser has failed to apply the statutory criteria to the Church and Property; therefore, the assessment is arbitrary and capricious. Furthermore, the amount of the assessment is wrong.

WHEREFORE, Plaintiff prays for judgment against the Defendant and entry of an order requiring that the statutory criteria be applied to the Church and Property on a non-arbitrary and non-capricious basis; declaring the assessment against the Property to be void and

extinguishing all liability of the Plaintiff thereunder; costs of this action; and such further and other relief as the Court may deem just.

COUNT III

BREACH OF PUBLIC POLICY

15. Plaintiff realleges and incorporates the statements of paragraphs 1 through 8 as if fully set out herein.

16. It has long been the public policy of Florida that real property owned by a tax-exempt organization and designated and used for charitable, religious, scientific, educational, or literary purposes is never subject to ad valorem taxes.

17. The attempt by the Appraiser to impose this assessment on the Church is a flagrant departure from this constitutionally-protected policy and from the provisions of the Florida Statutes.

18. The Church has supplied the Appraiser with adequate proof that the Property qualifies for exemption under Section 196.192(1) of the Florida Statutes.

19. Should this assessment stand and the Tax Collector be permitted to collect taxes based on said assessment, public policy would be breached and an unfortunate precedent with far-reaching harmful ramifications would be set.

WHEREFORE, Plaintiff prays for judgment against the Defendant and entry of an order requiring that the statutory criteria be applied to the Church and Property; declaring the assessment against the Plaintiff due to the Property to be void and extinguishing all liability of the Plaintiff thereunder; costs of this action; and such further and other relief as the Court may deem just.

COUNT IV

VIOLATION OF DUE PROCESS REQUIREMENTS

20. Plaintiff realleges and incorporates the statements of Paragraphs 1 through 19 as if fully set out herein.

21. Plaintiff received its notice of ad valorem assessment on the Property ("Notice") in November, 1989, showing taxes due in March, 1990, with a discount for early payment.

22. The Notice did not inform the Plaintiff that a void tax notice had to be assessed within sixty (60) days of certification of the tax rolls, pursuant to Section 194.171(2) of the Florida Statutes.

23. The Plaintiff was not notified that it was required to bring an action contesting the imposition of statutorily-prohibited taxes within sixty days of certification of the tax rolls or

be forever barred.

24. It is unreasonable to believe that the taxpayer would know, or have reason to believe, that the period for contesting the imposition of statutorily-prohibited taxes would end months prior to the final date the tax was due.

25. A statute requiring taxpayers to file an action contesting the imposition of a statutorily-prohibited tax within sixty days of certification of the tax rolls, or be forever barred, (i) without regard to the date the notices of tax due are received by the taxpayers, (ii) without regard to the length of the period between receipt of notice of tax due by the taxpayers and the date the action is barred, (iii) without notice to taxpayers of the unusually short period of time in which to file an action, and (iv) without regard to the fact that the tax is not

delinquent for approximately seven months, is overbroad on its face and is arbitrary and capricious in its effect.

WHEREFORE, Plaintiff prays that the Court find application of Section 194.171(2) of the Florida Statutes unconstitutional as applied to the Plaintiff, permitting Plaintiff to continue its action to contest the imposition of a void tax, and such further and other relief as the Court may deem just.

COUNT V

WRIT OF MANDAMUS

26. Plaintiff realleges and incorporates the statements of Paragraphs 1 through 25 as if fully set out herein.

27. This is a petition for a writ of mandamus.

28. Under Rule 12D-12.042 of the Florida Administrative Code, a duty of the Property Appraiser is to correct errors

made by themselves or their deputies in the correction of the tax roll. The corrections are to be made immediately upon discovery.

29. Errors of property appraisers may be corrected at any time.

30. Correction of errors is a ministerial responsibility of the Property Appraiser.

31. Plaintiff has a right to have Defendant Property Appraiser perform this duty in that, on or before December 29, 1989, Plaintiff requested that the Property Appraiser take notice that the Property was improperly classified as taxable property, when it was non-taxable property.

32. Property Appraiser, through his deputies and authorized representatives, refused to correct the classification of the Property.

33. Plaintiff has no other adequate

remedy to compel the Property Appraiser to perform his duty in the Property, in that the Property Appraiser has contested Plaintiff's action opposing the imposition of tax on the Property.

WHEREFORE, Plaintiff prays that this Court grant an order directing the Property Appraiser to show cause why the writ should not be granted and, after a hearing on this matter, to issue a peremptory writ ordering the Property Appraiser to correct the error in the classification of the Property and void the assessment on the property.

COUNT VI

BREACH OF CONTRACT

34. Plaintiff realleges and incorporates the statements of Paragraphs 1 through 19 as if fully set out herein.

35. On or about December 29, 1990, Gaylord Wood, attorney for Property

Appraiser, agreed on behalf of the Property Appraiser, with Plaintiff's authorized representative, to consider the merits of Plaintiff's claim that the Property was classified improperly.

36. At Mr. Wood's request, Plaintiff obtained a list of the uses of the Property and forwarded the list to Mr. Wood. When Mr. Wood did not respond, another copy of the list was forwarded one month later. Mr. Wood still failed to respond.

37. The Property Appraiser has breached his oral agreement with Plaintiff in that he has failed to consider the merits of Plaintiff's claim that the property was classified improperly.

38. Plaintiff has no adequate remedy in law.

WHEREFORE, Plaintiff prays that the Court order specific performance by the Property Appraiser of his agreement with

Plaintiff and such other and further relief as the Court deems proper.

COUNT VII

ESTOPPEL

39. Plaintiff realleges and incorporates the statements of Paragraphs 1 through 38 as if fully set out herein.

40. Plaintiff relied on Defendant's agreement to consider the merits of Plaintiff's claim that the Property was classified improperly.

WHEREFORE, Plaintiff prays that the Court order Defendant to consider the merits of Plaintiff's claim that the Property was classified improperly, and such further and other relief as the Court may deem just and proper.

E. SCOTT GOLDEN, ESQUIRE
Florida Bar No. 330442
Attorney for Plaintiff
644 S.E. 4th Avenue
Fort Lauderdale, Florida 33301
(305) 764-6766

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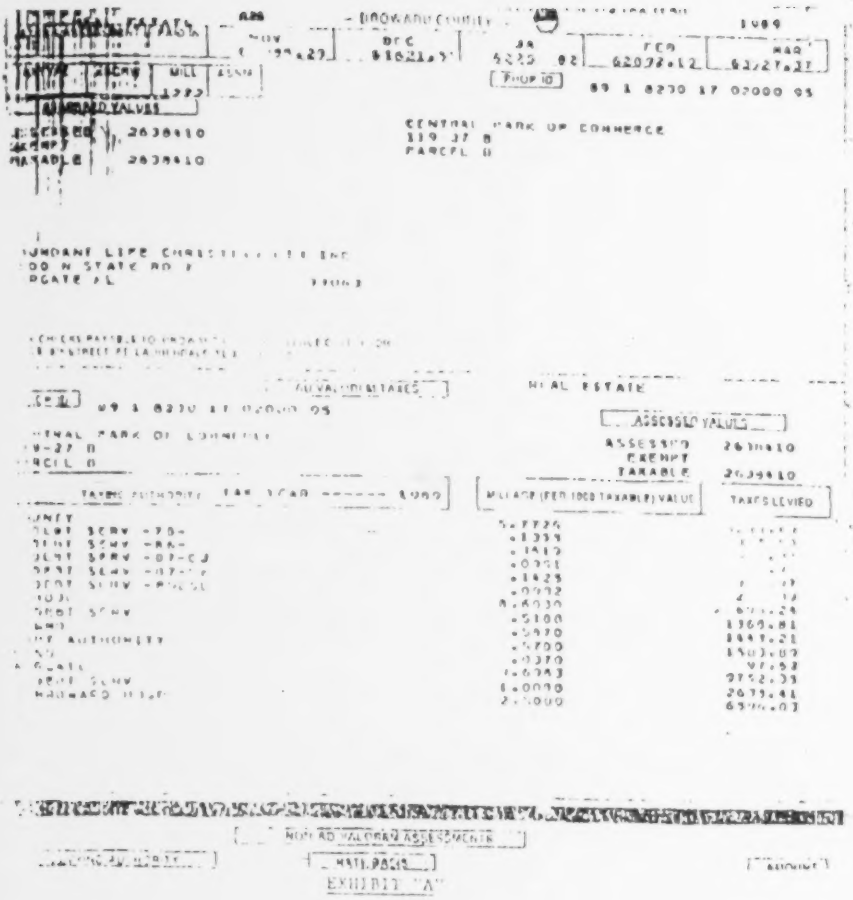

17a

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 90-09869 (18)
JUDGE: W. HERBERT MORIARTY

ABUNDANT LIFE CHRISTIAN CENTRE

Plaintiff,

vs.

WILLIAM MARKHAM, et al.

Defendants.
_____/

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come on to be heard on the Motion for Summary Judgment filed by the Defendant, WILLIAM MARKHAM, as Broward County Property Appraiser, and the Court having reviewed said Motion, and having heard the argument of counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion for Summary Judgment filed by the

Defendant, WILLIAM MARKHAM, as Broward County Property Appraiser, is denied.

DONE AND ORDERED in Chambers in Fort Lauderdale, Broward County, Florida, this 4th day of September, 1990.

/s/W. Herbert Moriarty
W. HERBERT MORIARTY
CIRCUIT JUDGE

Copies furnished to:
E. Scott Golden, Esq.
Gaylord Wood, Jr., Esq.

IN THE DISTRICT COURT OF APPEAL IN THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX A, WEST PALM BEACH, FL 33402

WILLIAM MARKHAM,
as Broward County
Property Appraiser,

Petitioner (s),

CASE NO. 90-2582

v.

ABUNDANT LIFE
CHRISTIAN CENTRE,
INC., et al,.

Respondent (s).
_____/

RESPONSE TO PETITION FOR WRIT OF PROHIBITION DIRECTED TO THE CIRCUIT COURT FOR THE 17TH JUDICIAL CIRCUIT

LAW OFFICES OF
PERRY W. HODGES,JR.
644 Southeast 4th Avenue
Fort Lauderdale, Florida 33301
Telephone No. (305)764-6766

TABLE OF CITATIONS
CASES

GULFSIDE INTERVAL VACATIONS, INC. V. SCHULTZ, 479 So.2d 776 (Fla. 2d DCA 1985) 6,7,8

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TULSA PROFESSIONAL COLLECTION SERVICES, INC. V. POPE, 108 S.Ct. 1340, 485 U.S. 478, 99 L.Ed.2d 565 (1988) 9,10,11

STATUTES

SECTION 193.122(2), Florida Statutes 4,5,10,12,13

SECTION 193.122(3),

Florida Statutes 4,5

SECTION 194.121,
Florida Statutes 13

SECTION 194.171(2),
Florida Statutes 1,3,5,6,7,8,9,10,11,12

SECTION 194.171(6),
Florida Statutes 5,6,7,8,9

SECTION 197.323(1),
Florida Statutes 4

SECTION 733.212,
Florida Statutes 12

SECTION 733.212(1)(a),
Florida Statutes 12

SECTION 733.702,
Florida Statutes 12

FACTS

On March 30, 1990, Respondent, ABUNDANT LIFE CHRISTIAN CENTRE, INC.,(Abundant Life) filed an action in the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida, in which Respondent contested the imposition of ad valorem real estate tax on certain real property owned by Abundant Life. Thereafter, Abundant Life filed a Seven Count Amended Complaint, which said Amended Complaint is now being challenged by Petitioner, William Markham (A-1-9).

On July 23, 1990, William Markham filed its Motion for Summary Judgment (A-10-14), alleging as the sole basis for the entry of a Summary Judgment, that Abundant Life's complaint was filed beyond the sixty days allowed for timely filing pursuant to sec. 194.171(2), Florida

Statutes (1989). In response to William Markham's motion, Abundant Life timely filed an affidavit of E. Scott Golden, Esq., the former counsel for Abundant Life (A-15-17). The allegations contained in Abundant Life's affidavit were unrebutted by William Markham at the hearing for Summary Judgment. The pertinent portions of the affidavit alleged that the attorney for Abundant Life spoke with Gaylord Wood, attorney for Petitioner William Markham, by telephone in December 1989. Mr. Wood requested that Abundant Life submit a list of the uses of the subject property since the date the property was purchased by Abundant Life for the church, and indicated that he would consider the merits of Abundant Life's assertions that the property was used for an exempt purpose (A-15-16, paragraphs 3 and 4).

Abundant Life then furnished a list of the exempt uses of the property, pursuant to attorney Gaylord Wood's request, and forwarded the list to Mr. Wood (A-16, paragraph 5). Attorney Gaylord Wood failed to further respond in any manner prior to Abundant Life's filing the original complaint in this cause on March 30, 1990 (A-16, paragraphs 5&7). Counsel for Abundant Life understood his December 1989 telephone conversation with Mr. Gaylord Wood to be an agreement that Mr. Wood would review the uses of the property on behalf of William Markham and that Abundant Life would not be prejudiced while Mr. Wood completed his review (A-16, paragraph 8). Furthermore, at no time did Mr. Wood or any member of William Markham's staff inform counsel for Abundant Life that the time to file a law

suit to contest the imposition of the ad valorem tax would, in their opinion, expire within sixty days of the first certification of the tax rolls of October 17, 1989. (A-17-18, paragraph 9).

In summary, the unrebutted facts before the trial court at the Summary Judgment hearing as presented by Abundant Life in the above-referenced affidavit as well as in its amended complaint, were that: (1) William Markham had specific knowledge that Abundant Life contested the imposition of the ad valorem tax on its real property; (2) That this knowledge by William Markham existed in December of 1989; (3) William Markham, despite this knowledge, never informed Abundant Life that it believed the sixty-day limitation period began to run on October 17, 1989, and that Abundant Life should therefore

file a law suit to contest the imposition of the ad valorem tax in order to protect its interests, and; (4) Not only did William Markham fail to inform Abundant Life of the sixty-day time period imposed by Section 194.171(2), Florida Statutes (1989), but it also undertook a course of conduct which led Abundant Life to believe that its claim was under review and that Abundant Life would not be prejudiced during the review period.

ARGUMENT OF LAW

I. ABUNDANT LIFE'S MARCH 30, 1989 ORIGINAL COMPLAINT WAS TIMELY FILED PURSUANT TO SECTION 194.171(2) FLORIDA STATUTES (1989), AS THE ENTIRE TAX ROLL WAS CERTIFIED FOR COLLECTION ON JANUARY 31, 1990.

It is undisputed that the tax roll was first certified by William Markham, by the property appraiser, on October 17,

1989. However, it was also admitted by counsel for William Markham at the subject hearing on William Markham's motion for Summary Judgment, that the entire tax roll was recertified for collection by the property appraiser on January 31, 1990. The original complaint herein was filed on March 30, 1989. Abundant Life's assertion, both in its amended complaint and at the Summary Judgment hearing, is that the second certification of the entire tax roll of January 31, 1990, is the correct date which began the running of the sixty-day filing period pursuant to Section 194.171(2), Florida Statutes (1989).

Section 194.171(2) Florida Statutes (1989) provides, in part, that "(2) No action shall be brought to contest a tax assessment after 60 days from the date the

assessment being contested is certified for collection under s. 193.122(2)....".

Section 193.122(2), Florida Statutes (1989), which section is referred to in the above-quoted statute, provides, in part:

> (2) After the first certification of the tax rolls by the property appraisal adjustment board, the property appraiser shall make all required extensions on the rolls to show the tax attributable to all taxable property. Upon completion of these extensions, and upon satisfying himself that all property is properly taxed, the property appraiser shall certify the tax rolls and shall within 1 week thereafter publish notice of the date and fact of extension and certification...(emphasis supplied).

It is clear that the property appraiser, under section 193.122(2), is required to certify the tax rolls as to all property. This first certification was performed by William Markham on

October 17, 1989. However, Florida Statutes also provide for the tax rolls being extended by the tax collector and certified prior to completion of the property appraisal adjustment board hearings (See section 197.323(1) Florida Statutes (1989)). In the case sub judice, the tax rolls were, in fact, extended, as the second certification of the tax rolls occurred on January 31, 1990.

Section 193.122(3), Florida Statutes (1989), provides the procedure to be utilized when the tax rolls have been extended. That section provides:

> (3) When the tax rolls have been extended pursuant to s. 197.323, the second certification of the property appraisal adjustment board shall reflect all changes made by the board together with any adjustments or changes made by the property appraiser. Upon such certification, the property appraiser shall recertify the tax rolls with all changes to

> the collector and shall provide public notice of the date and fact of recertification pursuant to subsection (2).

It is clear by the reading of the above quoted subsection, that the second certification of the tax rolls is only to reflect the changes made by the board, together with any adjustments or changes made by the property appraiser. It is not to recertify all property, but is only to recertify the property to which changes and adjustments were made subsequent to the first certification of the tax rolls. In the case sub judice, the property appraiser did not simply recertify only the property to which changes and adjustments were made pursuant to section 193.122(3). Instead, the property appraiser recertified the entire tax roll. In so doing, the property appraiser once again certified Abundant Life's tax

assessment for collection "under section 193.122(2)", thereby making the recertification date of January 31, 1990 the proper date from which the sixty-day period under section 194.171(2) began to run.

II. ENTRY OF SUMMARY JUDGMENT BY THE TRIAL COURT WOULD BE IMPROPER AT THIS POINT, AS ABUNDANT LIFE HAS TIMELY CHALLENGED THE CONSTITUTIONALITY OF SECTIONS 194.171(2) AND (6) FLORIDA STATUTES, 1989.

Alternatively, even if it is held that the October 17, 1989 date is the act which began the sixty-day period to run, Abundant Life has timely challenged the constitutionality of sections 194.171(2) and (6) in its amended complaint. William Markham's motion for Summary Judgment (A-10-14) did not address this issue, therefore it was not before the trial court at the hearing on the motion for Summary Judgment. That fact, in and of

itself, precludes William Markham's entitlement to the entry of Summary Judgment.

In Miller v Nolte, 453 So.2d 397 (Fla 1984), the Florida Supreme Court was faced with the identical issue of whether a taxpayer is foreclosed from contesting a tax assessment because of his failure to file an action within sixty days from the date the assessment was certified for collection. The Court, in a well reasoned opinion, stated:

> Persons have a right to due process when the protection and enforcement of their private rights are at issue. See Fuentes v Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L. Ed.2d 556 (1971); Goldberg v Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Due process requires that section 194.171(2) be considered a statute of limitations. (emphasis added)

Id. at 401

The Court in Miller further expressed its concern that should section 194.171(2)

be construed to be non-claim statute, the taxpayer would be unable to raise any valid estoppel arguments as to why the taxpayer failed to file an action within sixty days of certification. Id at 401.

However, the court in Miller was addressing a pre-1983 tax assessment, and therefore did not address the subsequent enactment by the Florida legislature of subsection 194.171(6). Effective July 1, 1983, subsection (6) was added to section 194.171, making compliance with subsection (2) "jurisdictional".

The due process concerns, as expressed by the court in Miller, however, remain. The Florida legislature's addition of subsection (6) making the requirements of subsection (2) jurisdictional serves only to underscore the due process concerns of the Florida

Supreme Court in Miller.

The Second District Court of Appeal in Gulfside Interval Vacations, Inc. v Schultz, 479 So.2d 776 (Fla 2d DCA 1985), as cited by William Markham in its Petition for Writ of Prohibition, dealt specifically with both sections 194.171(2) and 194.171(6), Florida Statutes. There, the taxpayer had filed a law suit contesting a tax assessment after the sixty-day period from the date the assessment being contested was certified for collection. The Gulfside court, in adopting the plain meaning of subsection (6), held that the sixty-day requirement of subsection (2) was to be construed as a jurisdictional statute of non-claim rather than a statute of limitations. Therefore, the appellate court held that the trial court lacked jurisdiction to consider the

taxpayer's law suit. However, the Gulfside court didn't just stop there. The court went on to further state that:

> Were we free to do so, we would address the constitutionality of this result. It seems to us that barring a suit such as this at the expiration of sixty days following certification of the tax rolls--an event of which most taxpayers are unaware and of which taxpayers are not given specific notice--is inherently unfair and inequitable, and raises serious due process concerns. As the supreme court said in Miller v Nolte, persons have a right to due process when the protection and enforcement of their private rights are at issue. The court expressly stated "due process requires that section 194.171(2) be considered a statute of limitations."
>
> However, the record does not reflect that the question of constitutionality of applying subsection (6) in this case was raised in the trial court, and it has not been raised on this appeal. Therefore, we are foreclosed from considering that issue. We have no alternative but to affirm the action of the

> trial judge in dismissing this suit with prejudice. (emphasis supplied)

Id. at 778.

In the case sub judice, unlike the case before the court in Gulfside, the taxpayer, Abundant Life, has timely asserted and addressed the constitutionality of section 194.171(See A-5-6, Count IV)

The Florida Supreme Court dealt with the identical issue in Markham v Neptune Hollywood Beach Club, 527 So.2d 814 (Fla. 1988). There, the court expressly approved of the decision of the Second District Court of Appeal in Gulfside, supra. The Markham Court held that the taxpayer's law suit was properly dismissed by the trial court in light of the clear expression of the legislative intent contained in subsection (6) that

subsection (2) be considered a jurisdictional statute of non-claim. However, the Florida Supreme Court in Markham, as did the Second District Court of Appeal in Gulfside, went out of its way to point out in footnote 5 of the opinion, that the constitutionality of section 194.171(6) was not raised by the taxpayer. Id. at 816. In fact, the Markham Court further went out of its way to quote a portion of its previous opinion in Miller, supra, in which the court held that "due process requires that section 194.171(2) be considered a statute of limitations." Id. 816.

It is quite evident from the opinions in Gulfside and Markham, that the courts were precluded from addressing the due process and constitutionality concerns raised by the Florida supreme court in

Miller, supra. These concerns however, have been raised by Abundant Life in the case sub judice. Abundant Life, both in its amended complaint (A-5-6), and in its affidavit (A-15-17) raises several due process concerns relative to the application of subsections 194.171(2), and (6), Florida Statutes (1989) to the facts of this case. The property appraiser, William Markham, was aware not only of the existence of Abundant Life, but also that Abundant Life challenged the ad valorem tax assessment. Furthermore, the property appraiser was aware of these matters in December of 1989. In fact, William Markham requested that Abundant Life furnish information to it regarding Abundant Life's use of the property for tax exempt purposes, thereby delaying any attempt by Abundant Life to seek legal

action.(A-15-17, paragraphs 4 through 9; A-5-6, Count IV)

The due process issue vis-a-vis statutes of non-claim was addressed by the United States Supreme Court in Tulsa Professional Collection Services, Inc. v Pope, 108 S.Ct. 1340, 485 U.S. 478, 99 L.Ed.2d 565 (1988). There, the United States Supreme Court dealt with Oklahoma's Probate Code which required creditors to file claims against an estate within two months of the date of first publication. The method of notice to the creditors under Oklahoma's probate code was by publication. The Appellant, an assignee of a hospital's claim for expenses connected with the decedent's final illness, failed to timely file a claim in the probate estate. Therefore, the probate court denied the claim as being

untimely. The United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment required the Appellant be given notice by mail or such other means as is certain to ensure actual notice if Appellant's identity as a creditor was known or reasonably ascertainable Id. at 1346-1347. The Court stated:

> Providing actual notice to known or reasonably ascertainable creditors, however, is not inconsistent with the goals reflected in non-claim statutes. Actual notice need not be inefficient or burdensome. We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice. Id. at 1347.

In the case sub judice, William Markham had specific knowledge in December of 1989, that Abundant Life contested the tax assessment. Despite this knowledge, Abundant Life was never notified that

William Markham contended or believed that the date that began the period to contest the tax was the date of first certification of the tax rolls on October 17, 1989.(A-16-17, paragraph 9).

Adding to these due process concerns, the property appraiser is not even required by Florida Statutes to advise the taxpayer of the fact that no action may be brought to contest a tax assessment after sixty days from the date the assessment is certified for collection as provided under Florida Statute 194.171(2). The only notice that is required to be given by the property appraiser is found in subsection 193.122(2), which simply requires the property appraiser "publish notice of the date and fact of extension and certification in a periodical meeting the requirements of s. 50.011 and publicly

display a notice of the date of certification in the office of the property appraiser..." Simply furnishing the date and fact of extension and certification of the tax rolls does not in any way inform the taxpayer of the effect of the certification relative to the taxpayer's ability to maintain an action to contest the tax assessment under section 194.171(2). This minimal notice requirement of section 193.122(2), Florida Statutes, (1989) does not meet the standard expressed by the Court in Pope, supra, at 1344, in which the Court quoted with approval a portion of its opinion in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, at 314, 70 S.Ct. 652, at 657, 94 L.Ed. 180 (1983) which established the fact that notification of state action which affects property must

generally be given:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

The only notification required to be given a taxpayer, as previously stated, is publication of the date and fact of certification by the property appraiser. Certainly this notice is not "reasonably calculated" to apprise the taxpayer of the sixty-day time period set forth in section 194.171(2), Florida Statutes (1989); as it does not apprise the taxpayer at all of this fact. (See Appendix A-3 of William Markham's Petition for Writ of Prohibition). Without giving notice of the certification of the tax rolls relative to the running of the sixty-day

time period of section 194.171(2), the publication of the date and fact of certification is meaningless to the average taxpayer. This is particularly true in light of the fact that ad valorem taxes are not past due until after April 1 of the following year. In fact, a discount is given to the taxpayer if payment is made prior to that time. A statutory scheme requiring an action be brought contesting a tax assessment several months prior to the date the taxpayer must pay the tax, only serves to magnify due process concerns relative to section 194.171(2), Florida Statutes (1989).

The decision by the United States Supreme Court in Pope, supra, was relied upon by the court in Public Health Trust v. Estate of Jara, 526 So.2d. 745 (Fla. 3d

D.C.A. 1988). There, the court, noting the facts before it were not distinguishable from the facts in Pope, implied by its ruling that Florida's probate nonclaim statutes, sections 733.212 and 733.702, Florida Statutes (1987), violated the notice requirements of the due process clause under the Fourteenth Amendment of the United States Constitution by not requiring notice by mail to known creditors of an estate. Id. at 745. (Effective July 5, 1989, section 733.212 was amended to require personal service by the personal representative of the notice administration upon reasonably ascertainable creditors.)

In order to satisfy the due process concerns with respect to the content of the notice required to be given by the Florida Statutes (1989), the property

appraiser should, at the very least, be required to notify the taxpayer of the sixty-day time period set forth in section 194.171(2), Florida Statutes (1989). Florida's probate nonclaim statute section 733.212(1)(a), Florida Statutes (1989) requires the personal representative to include, in its published notice of administration, the fact that all claims against the estate must be filed "within the time periods set forth in ss. 733.702 and 733.10, or be forever barred." (emphasis supplied). A similar notice requirement under section 193.122(2) Florida Statutes (1989) would certainly not impose an additional burden or expense upon the property appraiser, as it must already publish notice of the date and fact of certification under section 193.122(2) Florida Statutes (1989).

In light of Abundant Life's allegations contained in its amended complaint challenging the constitutionality of section 194.171, Florida Statutes (1989) as applied to Abundant Life under the facts of this case, the entry of Summary Judgment in favor of William Markham would be premature and improper, as this issue was not raised in William Markham's motion for Summary Judgment(A-10-14).

CONCLUSION

The trial court's order of September 4, 1990 denying William Markham's motion for Summary Judgment should not be vacated. The entire tax roll, which included Abundant Life's property, was certified for collection on January 31, 1990. Therefore, Abundant Life's original

complaint filed on March 30, 1990 was timely. Furthermore, Abundant Life has timely raised the issue in the trial court as to the constitutionality of section 194.171, Florida Statutes (1989). Therefore, this issue must still be addressed by the trial court.

Respectfully submitted,

Law Offices of
Perry W. Hodges, Jr.

BY:_____
PERRY W. HODGES, JR.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to GAYLORD A. WOOD, JR., 304 SW 12th Street, Fort Lauderdale, Florida 33315-1521, and THE HONORABLE W.

HERBERT MORIARTY, Circuit Court Judge, Broward County Courthouse, Room 801, Fort Lauderdale, Florida 33301. this ___ day of October, 1990.

LAW OFFICES OF
PERRY W. HODGES, JR.
644 Southeast 4th Avenue
Fort Lauderdale, Florida 33301
Telephone No. (305) 764-6766

_____
PERRY W. HODGES, JR.
Florida Bar No. 181190

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1991

WILLIAM MARKHAM, as
Broward County Property
Appraiser,

Petitioner,

v. CASE NO. 90-2582

W. HERBERT MORIARTY,
Circuit Court Judge

Respondent.
_____/

Opinion filed February 6, 1991

Petition for Writ of Prohibition

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

B. Jordan Stuart of Law Offices
of Gaylord A. Wood, Jr., Fort
Lauderdale, for Petitioner.

Perry W. Hodges, Jr. of Law Offices
of Perry W. Hodges, Jr., Fort
Lauderdale, for Respondent Abundant
Life Christian Centre, Inc.

PER CURIAM.

This petition for writ of prohibition contests the jurisdiction of the circuit

court over a suit challenging the Broward County Property Appraiser's 1989 assessment of certain real property. We grant the petition for writ of prohibition, quash the trial court order denying petitioner's motion for summary judgment, and remand with directions to enter summary judgment in favor of the property appraiser. We sua sponte strike Abundant Life Christian Centre, Inc. as named respondent.

On March 30, 1990, Abundant Life filed an action contesting the imposition of real estate taxes. Among the other allegations of the complaint was an allegation that the property was exempt from taxes, and an allegation that the assessment notice violated due process in that it failed to notify the taxpayer that it was required to bring an action contesting the imposition of taxes within

60 days of certification of the tax rolls. Petitioner Markham filed a motion for summary judgment based on lack of jurisdiction, claiming that the complaint was untimely because it was filed beyond the 60 days allowed for filing pursuant to section 194.171(2), Florida Statutes (1989).

The tax roll was first certified by the property appraiser on October 17, 1989. Notice of the certification was published. The tax roll was then recertified on January 31, 1990. Respondent did not file a petition with the board challenging the tax assessment.

A writ of prohibition is the appropriate procedural device to quash the improper exercise of power without jurisdiction. Such a writ may issue where a trial court exceeds its jurisdiction by failing to dismiss a cause of action con-

testing a tax assessment where the jurisdiction requirements of section 194.171 are not met. Markham v. Hinckley, 544 So.2d 1139 (Fla. 4th DCA), rev. denied, 553 So.2d 1164 (Fla. 1989); Clark v. Cook, 481 So.2d 929 (Fla. 4th DCA 1985).

Section 194.171, Florida Statutes provides in part: (emphasis added)

> (2) No action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under s. 193.122(2), or after 60 days from the date a decision is rendered concerning such assessment by the property appraisal adjustment board....
>
> * * * *
>
> (6) The requirements of subsections (2), (3), and (5) are jurisdictional. No court shall have jurisdiction in such cases until after the requirements of both subsections (2) and (3) have been met.

In Markham v. Neptune Hollywood Beach Club, 527 So.2d 814 (Fla. 1988), the Florida Supreme Court held that the plain meaning of subsection (6) requires that

the sixty day requirement of subsection (2) be construed as a jurisdictional statute of nonclaim rather than as a statute of limitations. The Neptune court determined that the trial court lacked jurisdiction to consider a taxpayers' suit challenging an assessment, and the constitutionality of the authorizing time share statute, where the complaint was filed more than sixty days after the tax rolls were certified. [1]

In this case, the tax rolls were extended and certified prior to completion

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[1] The Florida Supreme Court previously had determined that the jurisdictional requirements of sec. 194.171 must be strictly enforced in Bystrom v. Diaz, 514 So.2d 1072, 1074 (Fla. 1987). See also Markham v. Hinckley, 544 So.2d 1139, 1140 (Fla. 4th DCA 1989).

of board hearings, as permitted by section 197.323(1). The property appraiser then recertified the entire tax rolls as set forth in section 193.122(3). Respondent claims that the date of the second certification of the tax roll by the property appraiser is the correct date to use as starting the running of the sixty day filing period.

Petitioner responds that the second certification of the tax roll by the property appraiser has no effect on the running of the time in which to file.

Section 193.122 provides in part as follows: (emphasis added)

> (1) The property appraisal adjustment board shall certify each assessment roll upon order of the board of county commissioners pursuant to s. 197.323, if applicable and again after all hearings required by s. 194.032 have been held....
>
> (2) After the first certification of the tax rolls by the property appraisal adjustment board, the property appraiser

shall make all required extensions on the rolls to show the tax attributable to all taxable property. Upon completion of these extensions, and upon satisfying himself that all property is properly taxed, the property appraiser shall certify the tax rolls and shall within 1 week thereafter publish notice of the date and fact of extension and certification in a periodical meeting the requirements of s. 50.011 and publicly display a notice of the date of certification in the office of the property appraiser. The property appraiser shall also supply notice of the date of the certification to any taxpayer who requests one in writing....

(3) When the tax rolls have been extended pursuant to s. 197.323, the second certification of the property appraisal adjustment board shall reflect all changes made... Upon such certification, the property shall recertify the tax rolls with all changes to the collector and shall provide public notice of the date and fact of recertification pursuant to subsection (2).

(4) An appeal of a property appraisal adjustment board decision pursuant to s. 194.036(1)(a) or (b) by the property appraiser shall be filed prior to extension of the tax roll under subsection (2) or, if the roll was extended pursuant to s. 197.323, within 30 days of recertification under subsection (3).

The language of the statute is clear. The 60 day filing period referred to in

section 194.171 is 60 days from the date of the initial certification as long as no petition challenging the assessment is pending before the Board and not 60 days from the date of a recertification. The critical date for filing an action in this instance was 60 days from October 17, 1990. Accordingly, the trial court's denial of petitioner's motion for summary judgment was a departure from the essential requirements of law.

Respondent also claims that the property appraiser was not entitled to a summary judgment because of respondent's constitutional challenge on due process grounds. Respondent contends that the notice requirements of section 193.122(2), Florida Statutes, do not comport with the standard set forth by the United States Supreme Court in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S.

478, 108 S.Ct. 134, 99 L.Ed.2d 565 (1988). In Pope, the Court considered Oklahoma's Probate Code. The Court held that the Due Process Clause of the Fourteenth Amendment required that a creditor be given notice by mail or such other means as is certain to ensure actual notice. Respondent argues that at the very least the notice to Florida taxpayers should contain a statement similar to that found ion the Florida probate nonclaim statute (section 733.212(1)(a), Florida Statutes) which states that all claims against the estate must be filed "within the time periods set forth in ss. 733.702 and 733.10, or be forever barred."

However persons owning property within a state are charged with knowledge of relevant statutory provisions affecting the control or disposition of property. North Laramie Land Co. v. Hoffman, 268

U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953 (1925). Here, the taxpayer or its representative was presumed to know the jurisdictional limitation which applies. Additionally, the principles which apply to notice in probate cases, as enunciated in Pope, are inapplicable here. in Pope, the Court distinguished nonclaim statutes with attributes of self-executing statutes of limitations from the probate nonclaim statute at issue. In the former, the self-executing feature of the statute and the state's limited involvement in the running of the time period prevent triggering protections of the Due Process Clause.

Furthermore, while the Pope court recognized that the requirement of actual notice in probate and bankruptcy proceedings, where a limited number of persons are involved, is not so burdensome

or impractical as to warrant reliance on publication notice alone, such is not the case with ad valorem tax assessments. Furthermore, section 193.122(2), Florida Statutes provides a means whereby a taxpayer can receive actual notice of the date of certification. It states that "the property appraiser shall also supply notice of the date of the certification to any taxpayer who requests one in writing. . . ."

Therefore, we grant the writ of prohibition, quash the order denying the motion for summary judgment, and remand to the trial court with directions to enter summary judgment in favor of petitioner. HERSEY, C.J., STONE AND POLEN, JJ., concur.

IN THE DISTRICT COURT OF APPEAL IN THE
STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX A
WEST PALM BEACH, FL 33402

WILLIAM MARKHAM, as
Broward County Property
Appraiser,

Petitioner(s),

v. CASE NO. 90-2582

W. HERBERT MORIARTY,
Circuit Court Judge

Respondent(s).
_____/

ALL PLEADINGS SIGNED
BY AN ATTORNEY MUST
INCLUDE THE ATTORNEY'S
FLORIDA BAR NUMBER

BY ORDER OF THE COURT:

ORDERED that Respondent, Abundant Life Christian Centre, Inc.'s Motion for rehearing is denied.

ORDERED that Respondent, Abundant Life Christian Centre, Inc.'s February 21, 1991 motion for certification is denied.

I hereby certify that the foregoing is a true copy of the original court order.

/s/Clyde L. Heath
CLYDE L. HEATH
CLERK

cc: Perry W. Hodges, Jr.
Gaylord Wood

cms

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 90-09869 18
JUDGE: W. HERBERT MORIARTY

ABUNDANT LIFE CHRISTIAN CENTRE

Plaintiff,

vs.

WILLIAM MARKHAM, et al.

Defendants.
_____/

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come before the Court upon the granting of a Writ of Prohibitition (sic), quashing the Order Denying Summary Judgment entered by this Court on September 4, 1990 in this case, the Court does hereby

ORDER AND ADJUDGE that the motion for Summary Judgment filed by the Defendant, WILLIAM MARKHAM, as Broward County Property Appraiser is hereby granted.

DONE AND ORDERED in Chambers in Fort Lauderdale, Broward County, Florida, this 4th day of March, 1991.

/s/W. Herbert Moriarty
W. HERBERT MORIARTY
CIRCUIT JUDGE

Copies furnished to:
Perry Hodges, Esq.
Gaylord Wood, Jr., Esq.

SUPREME COURT OF FLORIDA

WEDNESDAY, MAY 8, 1991

ABUNDANT LIFE CHRISTIAN CENTRE, INC.,

Petitioner,

vs. CASE NO. 77,830

WILLIAM MARKHAM, ETC.,

Respondent.

Abundant Life Christian Centre, Inc.'s Motion to File a Brief as the Real Party in Interest in these Proceedings, or, in the Alternative, to File a Brief on Behalf of W. Herbert Moriarty, Circuit Court Judge is hereby granted.

A True Copy KB

cc: Perry W. Hodges, Jr., Esquire
TEST: Gaylord A. Wood, Esquire
Hon. W. Herbert Moriarty, Circuit Court Judge

/s/ Sid J. White
Sid J. White, Clerk
Supreme Court of Florida

SUPREME COURT OF FLORIDA

FRIDAY, JUNE 28, 1991

ABUNDANT LIFE CHRISTIAN CENTRE, INC.,	*	
Petitioner,	*	
vs.	*	CASE NO. 77,830
WILLIAM MARKHAM, ETC.,	*	DISTRICT COURT OF APPEAL,
Respondent,	*	4TH DISTRICT NO. 90-2582

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

SHAW, C.J., MCDONALD, BARKETT, GRIMES and

KOGAN, JJ., concur

A True Copy KB

cc: Hon. Clyde L. Heath, Clerk
Perry W. Hodges, Jr., Esquire
TEST: Gaylord A. Wood, Esquire
Hon. W. Herbert Moriarty, Judge

Sid J. White, Clerk
Supreme Court of Florida

By: /s/ Betsy Hill
Deputy Clerk

STATE CONSTITUTIONAL PROVISIONS

Article VII, Section 3(a), of the Constitution of the State of Florida provides in pertinent part:

(a) . . . Such portions of property as are used predominately for educational, literary, scientific, religious or charitable purposes, may be exempted by general law from taxation.

STATUTORY PROVISIONS

Florida Statutes Sec. 193.122(2) provides as follows:

(2) After the first certification of the tax rolls by the property appraisal adjustment board, the property appraiser shall make all required extensions on the rolls to show the tax attributable to all taxable property. Upon completion of these extensions, and upon satisfying himself that all property is properly taxed, the property appraiser shall

certify the tax rolls and shall within 1 week thereafter publish notice of the date and fact of extension and certification in a periodical meeting the requirements of s. 50.011 and publicly display a notice of the date of certification in the office of the property appraiser. The property appraiser shall also supply notice of the date of the certification to any taxpayer who requests one in writing. These certificates and notices shall be made in the form required by the department and shall be attached to each roll as required by the department by regulation.

Florida Statutes Sec. 193.122(3) provides as follows:

(3) When the tax rolls have been extended pursuant to s. 197.323, the second certification of the property

appraisal adjustment board shall reflect all changes made by the board together with any adjustment or changes made by the property appraiser. Upon such certification, the property shall recertify the tax rolls with all changes to the collector and shall provide public notice of the date and fact of recertification pursuant to subsection (2).

Florida Statutes Sec. 194.171(2) provides as follows:

(2) No action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under s. 193.122(2), or after 60 days from the date a decision is rendered concerning such assessment by the property appraisal adjustment board if a petition

contesting the assessment had not received final action by the property appraisal adjustment board prior to extension of the roll under s. 197.323.

Florida Statutes Sec. 194.171(6) provides as follows:

(6) The requirements of subsections (2), (3), and (5) are jurisdictional. No court shall have jurisdiction in such cases until after the requirements of both subsections (2) and (3) have been met. A court shall lose jurisdiction of a case when the taxpayer has failed to comply with the requirements of subsection (5).

Florida Statutes Sec. 196.192(1) provides as follows:

(1) All property owned by an exempt

entity and used exclusively for exempt purposes shall be totally exempt from ad valorem taxation.

Florida Statutes Sec. 197.322(1) provides as follows:

(1) The property appraiser shall deliver to the tax collector the certified assessment roll along with his warrant and recapitulation sheet.

Florida Statutes Sec. 197.322(3) (1988) provides as follows:

(3) Within 20 days after receipt of the certified tax roll, the tax collector shall mail to each taxpayer appearing on the assessment roll, whose post-office address is known to him, a tax notice stating the amount of current taxes due

from the taxpayer and, if applicable, the fact that back taxes remain unpaid and advising the taxpayer of the discounts allowed for early payment. . . .